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No. 94-1161

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

YSLETA DEL SUR PUEBLO,
Petitioner,

v.

STATE OF TEXAS and ANN RICHARDS,
GOVERNOR OF THE STATE OF TEXAS,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITIONER'S REPLY BRIEF

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I. IGRA AND THE ELEVENTH AMENDMENT

Respondents are correct in stating that their appeal to the Fifth Circuit involves the important issue of whether the Indian Gaming Regulatory Act (IGRA)[1] violated the Eleventh Amendment.[2] Following the filing of the Tribe's Petition (and Respondents' Cross-Petition), this Court granted certiorari on the same issue in *Seminole Tribe of Indians v. Florida,* U.S. Supreme Court No. 94-12, petition for certiorari granted, 63 U.S.L.W. 3556, 3562 (January 23, 1995). Because the issues are so closely related, the

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[1] 25 U.S.C. § 2701-21 and 18 U.S.C. § 1166-1168.

[2] U.S. Const. amend. XI.

Tribe requests that this case be consolidated with *Seminole* to resolve the relationship between IGRA and the Eleventh Amendment.

Petitioner is the Ysleta del Sur Pueblo (Tribe), an Indian tribe as defined by IGRA. Respondents are the State of Texas and its Governor (State). But the Tribe and State agree that the Fifth Circuit was incorrect in avoiding the important issue of the impact of the Eleventh Amendment on IGRA. The Fifth Circuit instead decided that the Restoration Act,[3] which restored federal recognition to the Tribe, completely controls. The Court noted that Congress has the power to abrogate the State's Eleventh Amendment immunity, but found that the Restoration Act does not contain an abrogation clause like IGRA's. Although the Tribe and State disagree as to the total reach of IGRA, all parties to this case agree that the Fifth Circuit was incorrect in ruling that the Restoration Act eliminates any role for IGRA in Indian gaming on the Tribe's land in Texas.

The Tribe argues that IGRA occupies the entire field of Indian gaming; it is the single federal statute designed to regulate all Indian gaming in this country. The State argues that the Restoration Act has not been completely preempted by IGRA, but that it defines the scope of gaming for negotiations under IGRA. By holding that the Restoration Act eliminates any role for IGRA, the Fifth Circuit has left both the Tribe and Texas without any guidance as to how to regulate gaming on the Tribe's land, or even how to determine what forms of gaming are allowed. The only option left the Tribe to determine whether its requested gaming activities are "prohibited by the laws of the state of Texas," is to risk criminal sanction by conducting the activities.

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[3] 25 U.S.C. §§ 731 et seq. and 1300g et seq.

At page 2 of its Brief, the State asserts that "the Restoration Act and IGRA should be harmonized by allowing IGRA to govern the procedures by which the Ysleta del Sur Pueblo could pursue gaming while allowing the Restoration Act to govern the substantive question regarding which gaming activities were allowed." Brief at p. 2 (footnote omitted). The State urges the same position in Question II of its Conditional Cross-Petition for Writ of Certiorari. In short, the State concedes that IGRA, for some purposes, controls gaming on the Tribes' reservation. The Tribe argues that IGRA governs gaming on the reservation for all purposes.

The State, like the Tribe, argues that the Fifth Circuit's decision should be reversed. But, following reversal, Texas would then like to re-litigate what forms of Class III gaming are allowed under IGRA. The State ignores the fact that this exact issue has been decided as a factual determination by the trial court. If this Court reverses the Fifth Circuit's holding, as all parties agree it should, the result should not be a new trial but merely the re-establishment of the trial court's detailed determination of the scope of gaming in Texas under IGRA.

II. THE FIFTH CIRCUIT'S DECISION IS IN DIRECT CONFLICT WITH DECISIONS OF TWO OTHER CIRCUITS

Respondents attempt to distinguish the decision of the Fifth Circuit from those in *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685 (1st Cir.), *cert. denied*, 115 S. Ct. 298 (1994), and *United Keetowah Band of Cherokee Indians v. Oklahoma*, 927 F.2d 1170 (10th Cir. 1991). The State disregards the underlying principle shaping the opinions in those two decisions:

> [T]he very structure of [IGRA] forbids the assertion of state civil or criminal jurisdiction over class III gaming except when the tribe and the state have negotiated a compact that permits state intervention.

Narragansett, at 690, citing *Keetowah*, at 1177. There is no way to reconcile these holdings with the Fifth Circuit's holding that IGRA plays no role in the assertion of state jurisdiction over class III gaming by two Tribes [4] in Texas.

The First and Tenth Circuits held that IGRA controlled wherever it was in conflict with other federal statutes involving Indian gaming. The Fifth Circuit held the opposite, that IGRA does not control when it was in conflict with another federal statute. Admittedly, the statutes involved in *Narragansett* and *Keetowah* are different from the Tribe's Restoration Act. But the reach of those statutes shows the conflict among federal courts of appeal.

In *Narragansett*, the First Circuit construed the statute in conflict, the Rhode Island Indian Claims Settlement Act of 1978,[5] as granting full state criminal and civil jurisdiction,[6] even including regulatory jurisdiction, over that Tribe's land. Yet, the First Circuit held that IGRA controlled over the Settlement Act.

Under the Restoration Act, Texas enjoys full criminal jurisdiction over the Tribe's land.[7] However, there is no grant of general civil jurisdiction, as there was in the Rhode Island statute. Yet, the Fifth Circuit held that the Restoration Act controlled over IGRA.

In *Keetowah*, the Tenth Circuit construed the Assimilative Crimes Act [8] as not only making certain criminal laws of Oklahoma applicable as federal law on federal enclaves in Oklahoma, but as also allowing Oklahoma to criminally prosecute violations of that Act. Nevertheless, the Tenth

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[4] The Alabama-Coushatta Indian Tribe of Texas is subject to the same restrictions on gaming as the plaintiff Tribe in this case. 25 U.S.C. § 737.

[5] 25 U.S.C. 1701-1716.

[6] See, 25 U.S.C. 1708.

[7] 25 U.S.C. § 1300g-6(a).

[8] 18 U.S.C. § 13.

Circuit held the Assimilative Crimes Act had to give way to IGRA.

The Restoration Act, makes certain of the laws of Texas applicable as federal law on the Tribe's reservation in Texas. Notwithstanding, Texas cannot prosecute violations of the Act. Unlike the power given Oklahoma under the Assimilative Crimes Act, Texas's ability to enforce the Restoration Act is limited to civil suits for injunctive relief.[9] Nevertheless, the Fifth Circuit held IGRA had to give way to the Restoration Act.

Both the First and Tenth Circuit Courts of Appeal held that IGRA not only circumscribed the application of the previously enacted statutes at issue, but implicitly repealed any contrary provisions as well. Such decisions were mandated in order to give full effect to Congressional intent to establish in IGRA the national policy on Indian gaming. *Narragansett*, at 690.

In its Brief in Response to the Tribe's Petition for Writ of Certiorari, the State provides this Court with the following faulty analysis [10] of the *Narragansett* decision:

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[9] 25 U.S.C. § 1300g-6.

[10] The Brief of Respondents is replete with faulty analysis. First and foremost, the Respondents appear to argue a point not ruled on by the Fifth Circuit and not in issue in the Tribe's Petition for Writ of Certiorari: that the district court erred in holding that the Tribe's requested gaming activities are not prohibited by Texas and thus are not prohibited by the Tribe's Restoration Act. Contrary to the State's assertion, the Fifth Circuit never held that the Tribe is not entitled to pursue its requested gaming activities.

Respondents state at page three of their Brief that the "Fifth Circuit correctly decided that the Ysleta del Sur Pueblo is not entitled to pursue casino gambling in Texas." The Fifth Circuit never made such a finding. Although the Fifth Circuit did hold that § 1300g-6(a) of the Restoration Act did not codify the *Cabazon* test, the court never disturbed the trial court's finding that the Restoration Act did not prohibit the Tribe's requested gaming activities. The applicability of the *Cabazon* test is immaterial because the trial court did not rely on that test in determining

> The First Circuit implies that there could be a consensual transfer in the gaming area, albeit of criminal jurisdiction, which survives IGRA. This reasoning undermines the Tribe's position that no previous Act of Congress has independent meaning in the area of gaming after the passage of IGRA. *Rhode Island*, 19 F.3d at 697.

The statements of Respondents leave the impression that there was a grant of criminal jurisdiction to Rhode Island over gaming matters left unaffected by IGRA. Such was not the holding of the First Circuit. Instead, that Court held that IGRA repealed the State's jurisdiction over Indian lands for Class I and Class II gaming and limited the State's jurisdiction over Class III gaming to the Tribal-State compacting process created by IGRA. *Narragansett*, at 704. In short, the First Circuit placed Rhode Island in the same position as every other State, when it comes to regulating Indian gaming after the enactment of IGRA. By contrast, the effect of the Fifth Circuit's decision is to treat Texas differently from the other forty-nine States, at least with respect to two of the three Indian Tribes in the State.

III. THE FIFTH CIRCUIT'S DECISION WILL RESULT IN DISCRIMINATORY TREATMENT AMONG INDIAN TRIBES

The Fifth Circuit's decision to treat Texas differently from all other States will inevitably result in discriminatory treatment among the federally recognized Indian tribes of the nation and even among those located within a single State. The Fifth Circuit held the gaming provisions of the Restoration Act control gaming on the Tribe's land. The Alabama-Coushatta Indian Tribe of Texas is

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that the Tribe's requested gaming activities are not prohibited by the Restoration Act. Furthermore, because the Fifth Circuit resolved the appeal on a conflict in the enforcement procedures (not the scope of gaming provisions) between the two statutes, its conclusion concerning the scope of gaming permitted under the Restoration Act is reduced to dicta.

subject to those same gaming provisions.[11] But, a third federally recognized Tribe in Texas, the Texas Band of Kickapoo Indians, has requested the right to engage in Class III gaming. The Kickapoos have a federal recognition act which is devoid of any similar gaming provisions.[12] IGRA thus governs gaming by the Kickapoos of Texas, but not the other two Tribes in the State.

CONCLUSION

If this Court lets the Fifth Circuit's decision stand, while upholding IGRA against its Eleventh Amendment challenge, it will be creating two standards for Indian gaming. Although IGRA will apply to almost every Tribe and every piece of Indian land in the United States, even those subject to prior restrictive federal acts, it will not apply to certain Tribes unlucky enough to fall within the grasp of the Fifth Circuit.

Respectfully submitted,

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[11] 25 U.S.C. § 737.

[12] 25 U.S.C. § 1300b-11 et seq.